STATE OF MICHIGAN
IN THE SUPREME COURT

THOMAS JANSON,

Plaintiff/Appellee,

v.

SAJEWSKI FUNERAL HOME, INC.,

Defendant/Appellant.
_____/

Supreme Court No. 140071
Court of Appeals No. 284607
Lower Court No. 2006-622578-NO

AMICUS CURIAE MICHIGAN ASSOCIATION FOR JUSTICE'S BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE

Submitted By:

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other

INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (hereinafter MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. MAJ recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state. This case presents important issues of law, the resolution of which are important to jurisprudence in this state, and will have a direct and substantial impact on MAJ members' clients who are injured and seek compensation through litigation.

BRIEF STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

This case arises out of Plaintiff's slip and fall on black ice in the Defendant's parking lot. On August 25, 2009, the Court of Appeals issued an opinion for publication in this case. At issue in this case is whether the trial court properly granted summary disposition in Defendant's favor on the basis that the ice encountered by the Plaintiff on Defendant's parking lot was open and obvious as a matter of law. The Court of Appeals held that based on the facts of the case, application of the open and obvious doctrine would not be appropriate. Accordingly, the Court of Appeals reversed the trial court and remanded.

Defendant-Appellant filed an Application for Leave to Appeal on November 25, 2009. Plaintiff opposes the application, and Amicus Curiae likewise opposes Defendant's application on the basis that the Court of Appeals's decision is not clearly erroneous. Should this Court be inclined to not affirm, or to grant leave, Amicus Curiae would welcome an invitation to fully brief the issues.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN CONCLUDING THAT THE OPEN AND OBVIOUS DOCTRINE WAS NOT APPLICABLE BECAUSE THERE IS NO EVIDENCE WHATSOEVER THAT THE BLACK ICE WAS VISIBLE UPON CASUAL INSPECTION OR OTHER INDICIA OF ICE, THUS LEAVE SHOULD BE DENIED

The sole issue in this case is whether the Court of Appeals clearly erred when it held that the ice encountered by the Plaintiff was not open and obvious as a matter of law. There is no indication that the Court erred.

All issues in this appeal are reviewed under a de novo standard, as involving a trial Courts's decision on a motion for summary disposition. *Spiek v Dept of Transportation*, 456 Mich 331; 572 NW2d 201 (1998).

Generally, an invitor owes a duty to its invitees to exercise reasonable care to protect them from unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp. Inc.*, 464 Mich 512; 629 NW2d 384 (2001). In 2001, the Michigan Supreme Court also held that a "land owner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the land owner to inspect the premises and, depending on the circumstances, make necessary repairs or warn of any discovered hazards". *James v Alberts*, 464 Mich 12, 19-20; 626 NW2d 158 (2001); *Stitt v Holland*, 462 Mich 591, 97; 614 NW2d 88 (2000). Additionally, with respect to snow/ice removal, a premises owner owes a duty to an invitee to exercise reasonable care to diminish hazards to invitee of ice and snow accumulation on its property. *Quinlivan v Great Atlantic & Pacific Tea Co., Inc.,* 395 Mich 244, 235 NW2d 732 (1975).

Whether a danger is open and obvious depends upon whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. *Novotney v Burger King Corp. (On Remand),* 198 Mich App 470, 499 NW2d 379 (1993). When the potentially dangerous condition "is wholly revealed by casual observation, the duty to warn serves no purpose." *Id.* If this purpose is frustrated by the application of the doctrine to a particular set of facts because the condition is for all practical purposes invisible and indiscernible, then the application of the open and obvious danger doctrine would not be appropriate. *Slaughter v. Blarney Castle Oil Co.*, 281 Mich App 474, 760 NW2d 287, 281 (2008), lv den.

This Court has never erected an absolute barrier to recovery for injuries sustained on snow or ice plagued premises. To do so would eviscerate the duties owed by business owners to invitees in Michigan with respect to snow and ice accumulations. Rather, the outcome has always been fact specific. In *Mann v Shusteric Enterprises Inc.*, 470 Mich 320, 332; 683 NW2d 573(2004), the Michigan Supreme Court held <u>that not all accumulations of snow and ice are open and obvious as a matter of law</u>:

> **Thus, in the context of an accumulation of snow and ice, Lugo means that, <u>when</u> such an accumulation is "open and obvious . . ." *Id.* at 332.** (Emphasis added).

The emphasized language surely indicates that not all accumulations of snow and ice are open and obvious as a matter of law. In fact, the Court refrained from deeming open and obvious the "icy and snow-covered parking lot" upon which the intoxicated plaintiff fell and remanded the

case to the trial court.

There is no published case wherein it was held that black ice alone was open and obvious as a matter of law. Black ice was addressed, however, in *Slaughter, supra.* In that case, a plaintiff slipped and fell on black ice in a gas station parking lot at night while exiting her vehicle. The parking lot was well lit, but she did not see any ice before she stepped down. The trial court denied the defendant's summary disposition motion based on the open and obvious doctrine. The Court of Appeals affirmed, and the opinion was published. The Court of Appeals reviewed prior case law as it pertains to premises claims involving snow and ice and the application of the open and obvious doctrine, and noted that Courts have progressively imputed knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months [1]. However, the Court noted that those cases involve snowy conditions or snow covered ice, and that there is no published opinion wherein it was held that black ice is open and obvious as a matter of law. The Court declined to extend the doctrine to black ice without evidence that the black ice in question would have been visible on casual inspection before the fall or without other indicia of a potentially hazardous condition. *Id. At 482-483.*

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[1] Amicus Curiae opposes this "progression" and asserts that the application of the open and obvious doctrine has been contorted over the years to absurd lengths. The case law strayed from a "visible upon casual inspection" analysis to a whether the plaintiff should have been a weather prognosticator and predicted the formation of ice. Even a puddle of water in the stall of a handicap accessible bathroom stall was deemed open and obvious to a blind man. *Sidorowicz v Chicken Shack Inc.*, Unpub. Court of Appeals Docket No. 239627 (January 17, 2003). Again, Amicus Curiae would welcome and invitation to fully brief the issues presented in this case should leave be granted.

This Court denied the defendant's application for leave.

Likewise, in this case, leave to appeal should be denied. Per the facts as set forth in the opinion, the Plaintiff did not see ice before he fell, the roads to the funeral home were clear, the parking lot appeared to be clear, Plaintiff did not encounter other patches of ice in the parking lot before he fell, Defendant's parking lot operator testified that he did not see ice in the parking lot, there is nothing in the record indicating that Plaintiff saw someone else slip before he fell or that there was snow around the area where Plaintiff fell. Simply put, the Court held that based on these facts, the ice was not visible and there was no other indicia of ice as to alert Plaintiff as to its presence, thus the trial court erred in determining that the ice was open and obvious as a matter of law.

Amicus Curiae fails to see how this opinion is clearly erroneous. As such, leave should be denied.

II. EVEN IF SOME OTHER INDICIA EXISTED ALERTING PLAINTIFF TO THE PRESENCE OF BLACK ICE, DETERMINING WHETHER A REASONABLY PRUDENT PERSON IN PLAINTIFF'S POSITION WOULD HAVE RECOGNIZED THE HAZARD IS A JURY QUESTION

Defendant asserts that since the incident occurred during the winter, it had rained earlier during the morning, it was below freezing all day, and Plaintiff was a Michigan resident, the Court of Appeals erred when it held that there was no indicia of ice that should have alerted Plaintiff to its presence.

First and foremost, no ice was visible, per several witnesses. Further, other indicia lulled Plaintiff into believing that the parking lot was ice free. The roads were clear, the parking lot

looked clear, precipitation had ceased, he didn't see anyone one else slipping, and there was no snow in the area.

Since there is conflicting evidence whether Plaintiff should have recognized the hazard posed by the black ice, the trial court erred in granting Defendant's motion for summary disposition, and the Court of Appeals was correct in reversing the trial court. A trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition. *Johnson v Wayne Co.*, 213 Mich App 143, 149; 540 NW2d 66 (1995); *In re Peterson,* 193 Mich App 257, 261; 483 NW2d 624 (1992).

III. IF LEAVE IS GRANTED, THE VIABILITY OF THE DOCTRINE ITSELF SHOULD BE AT ISSUE

It is the position of Amicus Curiae that the open and obvious doctrine is no longer viable since Michigan adopted comparative negligence principles.

In 1995, the Michigan legislature rejected contributory and pure comparative negligence principles and instead adopted a hybrid comparative negligence stance via the enactment of MCL 600.2959. The statute provides that in all actions based on tort or other theories seeking damages for bodily injury, property damage or wrongful death, the court must reduce the plaintiff's damages by the percentage of his or her fault, but a plaintiff whose percentage of fault is greater than the aggregate fault of the other person(s) cannot recover noneconomic damages.

Despite the clear language of the comparative negligence statute, the open and obvious doctrine, as applied by the courts, bars a plaintiff's claim regardless of the attributed percentage of fault. It appears that the courts, without actually stating so, are finding that if a condition is open and obvious, the plaintiff is automatically more than 50% at fault because the plaintiff

failed to avoid what was there to be seen. This is evident in *Lugo*, wherein this Court, referencing *Bertrand v Alan Ford, Inc.*, 449 Mich. 606, 609, 537 NW2d 185 (1995), reiterated that there is an overwhelming public policy encouraging persons to take reasonable care for their own safety. *Lugo, supra*, at 389.

Further, as previously noted, courts have strayed from the "visible upon casual inspection" analysis and have charged plaintiff's with a duty to predict dangerous conditions even if they are not there to be seen. Thus, a plaintiff 's case is barred merely because the plaintiff wasn't as astute as some judges thought that the plaintiff should have been. This is a slippery slope that seemingly has no bounds.

The open and obvious doctrine is a judicially created tool that punishes a plaintiff for failing to avoid what was there to be seen by barring the plaintiff's entire claim. Since MCL 600.2959 contains appropriate penalties for a plaintiff's comparative negligence, the open and obvious doctrine, as it is currently being applied, is obsolete. A ruling to that effect would not be a radical shift in the law, but a logical restoration of accountability. Plaintiffs would still be held accountable for negligent conduct, and business owners would still be held accountable for premises safety.

In fact, the final draft of the 3rd Restatement of Torts with respect to landowner liability hints that the bright-line no duty rule in Section 343A of the 2nd Restatement of Torts, upon which Michigan's open and obvious law is seemingly based[2], will be deleted [3]. Volume 2 of the

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[2] Lugo, supra at 390.

[3] Marks, *The Limit to Premises Liability for Harms Caused by "Known or Obvious Dangers": Will It Trip and Fall Over the Duty-Breach Framework in There Restatement (Third) of Torts*?, 38 Tex Tech L Rev 1 (Fall, 2005).

3rd Restatement of Torts is expected to be released in 2011, per the American Law Institute. Should leave be granted in this case, Amicus Curiae would welcome an invitation to fully brief this issue.

CONCLUSION

Amicus Curiae Michigan Association for Justice respectfully request that this Honorable Court deny Defendant's application. Should this Court be inclined to grant leave, Amicus Curiae would welcome an invitation to fully brief the issues presented herein.

Respectfully submitted,

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